Supreme Court, U.S.
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No. 85-2112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LODI TRUCK SERVICE, INC.,
Appellant,

vs.

DIVISION OF LABOR STANDARDS ENFORCEMENT
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA
Appellee.

On Appeal from the Superior Court of the State of California, County of San Joaquin, Appellate Department

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Is there a substantial federal question regarding jurisdiction of the State of California to regulate overtime pay to mechanics in the face of the unexercised statutory authority of the United States Secretary of Transportation to prescribe requirements for qualifications and maximum hours of service of such class of employees?

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Superior Court on the ground that this case does not present a substantial federal question.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Appellant has challenged the jurisdiction of the California Department of Industrial Relations to promulgate, and the California Division of Labor Standards Enforcement to enforce, Industrial Welfare Commission Order No. 9-80 to the extent that it prescribes payment of overtime to persons who are employed as mechanics in the transportation industry in the State of California

where an employer trucking company is engaged in interstate commerce. This appeal follows judgment from the Municipal Court of California for the County of San Joaquin, Lodi Judicial District, in favor of the California Division of Labor Standards Enforcement ordering appellant to pay overtime wages to mechanics in the amount of $14,831.77 plus interest and costs of suit.

The judgment was affirmed by the Appellate Department of the Superior Court of the State of California for the County of San Joaquin and certification for further appellate review was denied by the California Court of Appeal in and for the Third Appellate District. Copies of the judgment of the Municipal Court, appellate decision of the Superior Court appellate Department and denial of certification by the Court of Appeal are included as appendices to the Jurisdictional Statement which has been filed on behalf of appellant.

Appellant employer contends that any state regulation of the hours of mechanics who are employed by California carriers which are engaged in interstate commerce is preempted by provisions of the Federal Department of Transportation Act, which authorize the Secretary of Transportation to prescribe requirements for qualification and hours of service of safety-of-operations employees of motor carriers engaged in interstate commerce. In support of this contention, appellant relies upon case authority which stands for the proposition that, as between two federal regulatory schemes, there is no concurrent regulatory authority. Appellees maintain that, absent any federal regulation or conflict between federal and state regulatory authority, the exercise of state police power governing hours and wages of mechanics in the transportation industry is not preempted.

ARGUMENT

THE AUTHORITY OF THE STATE OF CALIFORNIA TO REGULATE PAYMENT OF OVERTIME TO MECHANICS IS NOT PREEMPTED BY THE UNEXERCISED REGULATORY AUTHORITY OF THE SECRETARY OF TRANSPORTATION PURSUANT TO THE FEDERAL DEPARTMENT OF TRANSPORTATION ACT

Title 49 U.S.C. section 3102(b) authorizes the Secretary of Transportation to prescribe requirements for qualifications and maximum amount of service of safety-in-operation employees of motor carriers engaged in interstate commerce. Pursuant to this authority, the Secretary has prescribed regulations governing the hours of service of drivers. 49 C.F.R. 395.1-395.13. Of critical significance to this appeal, however, is the fact that the Secretary has prescribed no regulations governing the hours of mechanics of motor carriers engaged in interstate commerce.

California Industrial Welfare Commission Order No. 9-80, codified as Title 8, section 11090 of the Administrative Code of the State of California, governs wages, hours, and working conditions of persons employed in the transportation industry within the State of California. In pertinent part, subsection (H) of such Order provides as follows:

> "The provisions of this section are not applicable to employees whose hours of service are regulated by (1) the United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers, . . . "

It is established beyond question that state law is preempted by federal legislation only where there is a clear and manifest congressional indication of intent to preempt the field or where there is an inherent conflict between federal and state law. *Malone v. White Motor Corp.*, 435 U.S. 151, 157-158 (1958); *New York Department of Social Services v. Dublino,* 413 U.S. 405, 414 (1973); *Terminal Association v. Trainmen,* 318 U.S. 1, 6-7 (1943). Where a state's exercise of its police powers is challenged under the Supremacy Clause, established authority dictates that historic police powers of the state are not to be

superseded by federal legislation absent a "clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

A conflict between federal and state law, as a basis for preemption, will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In the absence of a persuasive demonstration by appellant employer that Congress has intended to prohibit non-conflicting state regulation, or that an actual conflict between federal and state regulations exists, state regulation is permissible.

It is equally well established that Congressional delegation of *authority* to regulate, absent the exercise of such authority in a manner which conflicts with state regulation, does not preempt state regulations. In *Welch Co. v. New Hampshire*, 306, U.S. 79 (1939), this court held that the enforcement of state law governing the activities of an interstate motor carrier subsequent to the passage of Federal Motor Carrier Act of 1935, but prior to the effective date of a regulatory order of the Interstate Commerce Commission, was permissible. *Id.* at pp. 84-85. This court has subsequently repeatedly sustained state regulation of commerce-related activity where federal agencies have been authorized to regulate but have failed to exercise such authority. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 171-172 (1978); *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960); *Service Transfer Co. v. Virginia*, 359 U.S. 171, 179 (1959); *Bethlehem Co. v. State Board*, 330 U.S. 767, 773 (1946). See also *Arkansas Elec. Coop. v. Ark. Public Serv. Comm'n.* 461 U.S. 375, 387-389 (1983).

The principal authorities upon which appellant relies are cases which have involved the issue of concurrent federal regulatory authority under the Fair Labor Standards Act and the Motor Carriers Act of 1935. See *Morris v. McComb*, 332 U.S. 422 (1948); *Levinson v. Spector Motor Co.*, 330 U.S. 631 (1947); *United States v. American Trucking Assns.*, 310 U.S. 534 (1940).

None of these cases concerned the issue of preemption of state regulation based upon the existence of unexercised federal regulatory authority. Such cases are therefore readily distinguishable from the instant case.

In light of the foregoing argument and authority, it is apparent that the issue presented by this appeal has been so explicitly foreclosed by prior decisions of this court as to leave no room for real controversy. Under these circumstances, the issue presented by appellants is deemed insubstantial and proper cause for dismissal of the appeal. *Palmer Oil. Corp. v. Amerada Corp.*, 343 U.S. 390, 391 (1952); *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

Nor is the pendency of other federal and state court cases involving the issue presented by this appeal persuasive with regard to the significance of such issue. All of the federal cases cited at page 7 of the jurisdictional statement have been filed by counsel for appellant. The other pending state court cases also referenced by appellant are enforcement proceedings of the nature of the instant case. Several of such cases involve the same trucking companies on behalf of whom counsel for appellant has filed actions for declaratory relief in the United States District Court for the Northern District of California.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the court should dismiss the appeal or, in the alternative, affirm the decision of the California Superior Court.

Dated: July 18, 1986

Respectfully submitted,

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